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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Chris Kohler,	)	CV 11-4451 RSWL (SPx)
	)	
Plaintiff,	)	<b>ORDER re: Plaintiff's</b>
	)	<b>Motion to Strike</b>
v.	)	<b>Affirmative Defenses</b>
	)	<b>under Rule 12(f) or For</b>
Bed Bath & Beyond of	)	<b>Summary Judgment or</b>
California, LLC, et al.	)	<b>Partial Summary Judgment</b>
	)	<b>in the Alternative [38]</b>
	)	
Defendants.	)	
	)	
	)	

On February 1, 2012, Plaintiff Chris Kohler's ("Plaintiff") Motion to Strike Affirmative Defenses under Rule 12(f) or For Summary Judgment or Partial Summary Judgment in the Alternative [38] came on for regular calendar before this Court. The Court having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

The Court hereby **GRANTS in part** and **DENIES in part** Plaintiff's Motion to Strike under Federal Rule of

1 Civil Procedure 12(f) and **DENIES** Plaintiff's Motion for  
2 Summary Judgment. Under Rule 12(f), the Court may  
3 strike "an insufficient defense or any redundant,  
4 immaterial, impertinent or scandalous" matter from the  
5 pleadings. Fed. R. Civ. P. 12(f). The purpose of Rule  
6 12(f) is "to avoid the expenditure of time and money  
7 that must arise from litigating spurious issues by  
8 disposing of those issues prior to trial." Sidney-  
9 Vinstein v. A.H. Robbins Co., 697 F.2d 880, 885 (9th  
10 Cir. 1983). If a court strikes an affirmative defense,  
11 leave to amend should be freely granted, provided there  
12 is no prejudice to the moving party. Wyshak v. City  
13 Nat'l Bank, 607 F.2d 824, 826 (9th Cir. 1979).

14 Plaintiff has requested that the Court strike all  
15 forty-seven of Defendant Bed Bath & Beyond of  
16 California, LLC's (hereafter "Defendant") Affirmative  
17 Defenses. In its Opposition, Defendant has withdrawn  
18 twenty of its Affirmative Defenses; therefore, the  
19 Court will only address Defendant's remaining  
20 Affirmative Defenses.

21 The Court finds that Defendant's First Affirmative  
22 Defense, failure to state a claim, fails as a matter of  
23 law because it is not an affirmative defense but rather  
24 a failure of Plaintiff's prima facie case. Barnes v.  
25 AT & T Pension Ben. Plan-Nonbargained Program, 718 F.  
26 Supp. 2d 1167, 1174 (N.D. Cal. 2010) (ruling that  
27 failure to state a claim is not a proper affirmative  
28 defense). Therefore, the Court hereby **GRANTS**

1 Plaintiff's Motion to Strike as to Defendant's First  
2 Affirmative Defense. Defendant's First Affirmative  
3 Defense is **STRICKEN with prejudice** as no facts can be  
4 pled to constitute a proper affirmative defense.

5 The Court finds that Defendant's Second Affirmative  
6 Defense, expiration of the statute of limitations, is  
7 properly pled and is an appropriate affirmative  
8 defense. Daingerfield Island Protective Soc. v.  
9 Babbitt, 40 F.3d 442, 445 (D.C. Cir. 1994) (ruled that  
10 statute of limitations defense was properly pled by its  
11 bare assertion). Therefore, the Court hereby **DENIES**  
12 Plaintiff's Motion to Strike as to Defendant's Second  
13 Affirmative Defense.

14 As to Defendant's Third and Fourth Affirmative  
15 Defenses, negligence of third parties, the Court finds  
16 that this defense fails as a matter of law under the  
17 ADA. "[T]he ADA is clear that a public accommodation  
18 is responsible for its own violations of the ADA, and  
19 that such violations cannot be contracted away."  
20 United States v. AMC Entm't, Inc., 232 F. Supp. 2d  
21 1092, 1118 (C.D. Cal. 2002) (rev'd on other grounds)  
22 (rejecting the defendant's affirmative defense of third  
23 party negligence). Therefore, the Court hereby **GRANTS**  
24 Plaintiff's Motion to Strike as to Defendant's Third  
25 and Fourth Affirmative Defense with leave to amend.

26 As to Defendant's Sixth Affirmative Defense, no  
27 basis for attorney's fees under California Code of  
28 Civil Procedure § 1021.5, Plaintiff claims that he is

1 not seeking attorney's fees under § 1021.5, and thus,  
2 the defense should be stricken as irrelevant. The  
3 Court finds that while Plaintiff has sought attorney's  
4 fees from Defendant under § 1021.5 [Compl. at 43], the  
5 Affirmative Defense should be stricken because it is  
6 not an affirmative defense but rather a failure of  
7 Plaintiff's prima facie case. Therefore, the Court  
8 hereby **GRANTS** Plaintiff's Motion to Strike as to  
9 Defendant's Sixth Affirmative Defense. Defendant's  
10 Sixth Affirmative Defense is **STRICKEN with prejudice**  
11 because no facts can be pled to constitute a proper  
12 affirmative defense.

13 The Court finds that Defendant's Seventh and Tenth  
14 Affirmative Defenses, good faith and legitimate  
15 business purpose, are properly pled and could  
16 potentially relate to Plaintiff's state law claims or  
17 claims for punitive damages. Therefore, the Court  
18 hereby **DENIES** Plaintiff's Motion to Strike as to  
19 Defendant's Seventh and Tenth Affirmative Defenses.

20 The Court finds that Defendant's Eighth Affirmative  
21 Defense, equivalent facilitation, is sufficiently pled  
22 and is a proper affirmative defense against Plaintiff's  
23 claims under the ADA and California's Unruh Act. ADAAG  
24 § 2.3; 28 C.F.R. § 36.402. Therefore, the Court hereby  
25 **DENIES** Plaintiff's Motion to Strike as to Defendant's  
26 Eighth Affirmative Defense.

27 As to Defendant's Thirteenth Affirmative Defense,  
28 unclean hands, Plaintiff argues that it must be

1 stricken because it is inapplicable as a matter of law  
2 to ADA claims. The Court finds that the Affirmative  
3 Defense is properly pled with sufficient facts and  
4 could relate to Plaintiff's numerous state law claims.  
5 Specifically, Defendant alleges that Plaintiff is  
6 deliberately targeting Defendant's stores and asserting  
7 false and misleading accusations. Therefore, the Court  
8 hereby **DENIES** Plaintiff's Motion to Strike as to  
9 Defendant's Thirteenth Affirmative Defense.

10 As to Defendant's Eighteenth Affirmative Defense,  
11 not readily or likely achievable, Plaintiff argues that  
12 it was not sufficiently pled to constitute a defense.  
13 Plaintiff is correct when he states that Defendant has  
14 made a bare assertion without additional facts to  
15 support the defense, but the case law Plaintiff cites  
16 to, Molsk v. Foley Estates Vineyard, 531 F.3d 1043 (9th  
17 Cir. 2008), does not support his argument that  
18 Defendant is required to allege more at the pleading  
19 stage. Therefore, the Court hereby **DENIES** Plaintiff's  
20 Motion to Strike as to Defendant's Eighteenth  
21 Affirmative Defense.

22 The Court finds that Defendant's Twentieth  
23 Affirmative Defense, reliance on municipal  
24 permits/vested rights, is properly pled and applicable  
25 to Plaintiff's California state law claims.  
26 Plaintiff's only argument is that any state or local  
27 permits would be preempted by the ADA, but Plaintiff  
28 also makes state law claims, which would not be

1 preempted here. Therefore, the Court hereby **DENIES**  
2 Plaintiff's Motion to Strike as to Defendant's  
3 Twentieth Affirmative Defense.

4 The Court finds that Defendant's Twenty-Second and  
5 Twenty-Fifth Affirmative Defenses, de minimis  
6 deviations and reasonable portion of facility  
7 accessible, are properly pled and recognized defenses.  
8 Cherry v. City College of San Francisco, 2006 WL  
9 6602454, at \*5-6 (N.D. Cal. January 12, 2006)  
10 (recognizing the ADA's allowance for reasonable  
11 variances and equivalent facilitation). Therefore, the  
12 Court hereby **DENIES** Plaintiff's Motion to Strike as to  
13 Defendant's Twenty-Second and Twenty-Fifth Affirmative  
14 Defenses.

15 The Court finds that Defendant's Twenty-Eighth and  
16 Twenty-Ninth Affirmative Defenses, existence of  
17 adequate legal remedy and no basis for injunctive  
18 relief, are not affirmative defenses, but rather  
19 failures in Plaintiff's prima facie case for an  
20 injunction. Therefore, the Court hereby **GRANTS**  
21 Plaintiff's Motion to Strike as to Defendant's Twenty-  
22 Eighth and Twenty-Ninth Affirmative Defenses.  
23 Defendant's Twenty-Eighth and Twenty-Ninth Affirmative  
24 Defenses are **STRICKEN with prejudice** as no facts can be  
25 pled to constitute a proper affirmative defense.

26 As to Defendant's Thirtieth through Thirty-Third  
27 Affirmative Defenses, lack of standing, Plaintiff  
28 argues that these are not true affirmative defenses and

1 must be stricken. While standing is an essential  
2 element of a plaintiff's claim, some courts have  
3 recognized it as an affirmative defense. Solis v.  
4 Couturier, No. 08-02732-RRB, 2009 WL 3055207 at \*1  
5 (E.D. Cal. Sept. 17, 2009) ("Lack of standing is a  
6 recognized affirmative defense"). Therefore, the Court  
7 hereby **DENIES** Plaintiff's Motion to Strike as to the  
8 Thirtieth through Thirty-Third Affirmative Defenses.

9 The Court finds that Defendant's Forty-Fourth  
10 Affirmative Defense, a claim for attorney's fees, is  
11 not a valid affirmative defense. If it prevails,  
12 Defendant can bring a properly noticed and factually  
13 supported motion for attorney's fees after the Court  
14 has made a final ruling in this case. Therefore, the  
15 Court hereby **GRANTS** Plaintiff's Motion to Strike as to  
16 Defendant's Forty-Fourth Affirmative Defense.  
17 Defendant's Forty-Fourth Affirmative Defense is  
18 **STRICKEN with prejudice** as no facts can be pled to  
19 constitute a proper affirmative defense.

20 Finally, the Court hereby **DENIES** Plaintiff's Motion  
21 for Summary Judgment. Plaintiff has failed to make any  
22 supporting argument regarding the Motion, and the Court  
23 finds that Defendant has pled sufficient facts in its  
24 Affirmative Defenses to create a genuine issue of  
25 material fact.

26 In sum, the Court hereby **GRANTS** Plaintiff's Motion  
27 to Strike as to Defendant's First, Third, Fourth,  
28 Sixth, Twenty-Eighth, Twenty-Ninth, and Forty-Fourth

1 Affirmative Defenses. The Court allows Defendant **20**  
2 **days leave to amend** as to Defendant's Third and Fourth  
3 Affirmative Defenses. The Court hereby **DENIES**  
4 Plaintiff's Motion to Strike as to Defendant's Second,  
5 Seventh, Eighth, Tenth, Thirteenth, Eighteenth,  
6 Twentieth, Twenty-Second, Twenty-Fifth, and Thirty  
7 through Thirty-Third Affirmative Defenses.  
8 Additionally, the Court **DENIES** Plaintiff's Motion for  
9 Summary Judgment.

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11 **IT IS SO ORDERED.**

12 DATED: February 8, 2012

13  
14 RONALD S.W. LEW

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15 **HONORABLE RONALD S.W. LEW**

16 Senior, U.S. District Court Judge  
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